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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF OF AMICI CURIAE CBS INC., CAPITAL CITIES/ABC, INC., DOW JONES & COMPANY, INC., THE HEARST CORPORATION, KNIGHT-RIDDER, INC., NATIONAL BROADCASTING COMPANY, INC., PHILADELPHIA NEWSPAPERS, INC., REUTERS AMERICA INC., TIME INC., TRIBUNE COMPANY, TURNER BROADCASTING SYSTEM, INC., THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, ASSOCIATION OF AMERICAN PUBLISHERS, MAGAZINE PUBLISHERS OF AMERICA, INC., NATIONAL ASSOCIATION OF BROADCASTERS, NEWSLETTER PUBLISHERS ASSOCIATION, INC., NEWSPAPER ASSOCIATION OF AMERICA, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AND SOCIETY OF PROFESSIONAL JOURNALISTS, IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

This brief is submitted on behalf of 20 *amici curiae* which include broadcasters, publishers, news services, and associations of working journalists and writers.[1] As members of the media, these *amici* operate under the constant threat of libel claims, almost all of which seek punitive damages. Both the frequency and amount of these awards have increased at an alarming rate in recent years.

The threat of punitive damage awards affects the nation's media at all levels, from national news organizations to the smallest local newspapers and broadcasters, and interferes with their vital role in the reporting and discussion of controversial public affairs. These *amici* therefore support the strict application of due process limitations urged by the petitioner in this case.

More importantly, although the case presently before the Court does not involve First Amendment issues, these *amici* urge the Court to recognize that special considerations may arise where the Bill of Rights is implicated; punitive damage awards in libel cases involving matters of public concern may be irreconcilable with the purposes of the First Amendment; and even the strictest due process limitations on punitive awards may not be adequate to protect First Amendment values in such cases.

SUMMARY OF ARGUMENT

The libel decisions of this Court have examined the problem of unrestrained punitive damage awards at length, and the Court has imposed constitutional limits on such awards arising from speech on matters of public concern. These limits are largely the result of heightened scrutiny mandated by the First Amendment, but they serve as a valuable touchstone for addressing due process limitations on punitive damages in general.

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[1] Written consent of both parties has been filed with the Clerk of the Court, as required by Supreme Court Rule 37.

The Court recently imposed general due process constraints on punitive damage awards in *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991). As the case currently before this Court illustrates, however, the standards upheld in *Pacific Mutual* do not provide an effective check on the discretion of juries to impose enormous and unpredictable punitive damage awards. Nebulous requirements of proportionality to imprecise compensatory damages and vague assessments of past, present, and future conduct virtually assure juries the freedom to assess arbitrary awards against unpopular defendants, to which reviewing courts can do little more than defer.

At a minimum, such standards do not satisfy the heightened due process requirements of the First Amendment. Juries have used these standards to continue to award ever-increasing sums as punitive damages against media defendants, and courts' deferential review of such awards—when defendants can afford to appeal—cannot mitigate the resulting chill on constitutionally protected speech. The general due process standards employed by the West Virginia Supreme Court of Appeals provide no protection against unconstitutional excess in the award of such damages.

ARGUMENT

I. THE NEWS MEDIA REMAIN ESPECIALLY VULNERABLE TO THE ABUSES OF UNRESTRAINED PUNITIVE DAMAGE AWARDS.

The case before this Court represents only the second occasion on which the Court has been directly presented with the issue of due process constraints on the award of punitive damages. In libel cases, however, where First Amendment constraints are involved as well, the Court has long recognized the danger posed by punitive damages. In fact, the problem of unrestrained damage awards has been a constant theme in this Court's efforts to reconcile the common law of libel with competing First Amendment limitations.

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court recognized that the threat of unrestrained punitive damages raises severe constitutional problems as " 'a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law.' " *Id.* at 278 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).[2]

In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and again in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), the discussion of punitive damage awards occupied much of the Court's attention. Justice Harlan, originally supporting punitive damages in *Butts*, expressly retreated from that position in *Rosenbloom* and concluded:

> I would hold unconstitutional, in a private libel case, jury authority to award punitive damages which is unconfined by the requirement that these awards bear a reasonable and purposeful relationship to the actual harm done.

403 U.S. at 77 (Harlan, J., dissenting). In a separate opinion, Justice Marshall, joined by Justice Stewart,

[2] The Court observed:

> Presumably a person charged with violation of this [criminal libel] statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action. . . . And since there is no double-jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded . . . for the same publication.

376 U.S. at 277-78; *see also Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) ("although punitive damages are 'quasi-criminal,' their imposition is unaccompanied by the types of safeguards present in criminal proceedings") (citation omitted); Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 152-53 (1986); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 322-33 (1983) (suggesting application of Fourth, Fifth, and Sixth Amendments to punitive damages proceedings).

concluded that punitive damages should be prohibited altogether in such cases. *Id.* at 82-83 (Marshall, J., dissenting). These dissenting opinions became the foundation for the majority opinion in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), in which the Court concluded:

> [P]unitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries . . . .

Id. at 350.[3]

Later, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), four members of the Court joined in an opinion reasserting the objections to punitive awards discussed in *Rosenbloom* and *Gertz*, stressing juries' " 'largely uncontrolled discretion' to assess damages 'in wholly unpredictable amounts bearing no necessary relation to the actual harm caused' " as a rationale for the limitations imposed in *Gertz*. *Id.* at 779 (Brennan, J., dissenting) (quoting *Gertz*, 418 U.S. at 350).

Each of these cases, including *Dun & Bradstreet*, affirmed the need for constitutional limits on the availability of libel damages to protect discussion of public affairs, with the Court in *Gertz* holding simply:

> [T]he States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

418 U.S. at 349.

Despite these stated concerns and limitations, both the amount and frequency of punitive damage awards against

[3] *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 779 (1985) (Brennan, J., dissenting) ("Justice Harlan's perception formed the cornerstone of the Court's analysis in *Gertz*.").

the media in libel cases have continued to rise. During the 1980's, multi-million dollar verdicts against libel defendants became almost commonplace.[4] Many awards were overturned or reduced on appeal; many were questioned on constitutional grounds by courts and commentators alike;[5] but these facts are cold comfort to the publishers and broadcasters who may be forced to meet prohibitive bond requirements and to endure expensive appeals before constitutional safeguards are properly applied.

The trend toward ever-higher and increasingly irrational punitive awards has continued. The jury in *Feazell v. Belo Broadcasting Corp.*, No. 86-2227-1, National Law Journal, May 6, 1991, at 22 (Tex. Dist. Ct. April 19, 1991), awarded $41 million in punitive damages against

[4] One study reported that, between 1980 and 1984, approximately 60% of libel verdicts against media defendants included an award of punitive damages (compared to less than 10% for nonlibel cases involving money damages). The average punitive award was reported as substantially in excess of $2.5 million, and punitive damages accounted for approximately 80% of the total amount of damages awarded. Libel Defense Resource Center, *Recent Trends in Libel Damage Awards Against the Media*, Libel Defense Resource Center Bulletin No. 18 at 58-63 (Dec. 15, 1986). "In 1990-91 punitive damages were included by juries in more than three out of every four damage awards" and punitive damages during that period "averaged more than $8 million . . . with the median punitive award of $2.5 million, compared to just over $1.5 million and $200,000, respectively, for the [previous] decade." Libel Defense Resource Center Bulletin Special Issue B (July 31, 1992). *See also* Libel Defense Resource Center Bulletin No. 21 (Oct. 31, 1989); Libel Defense Resource Center Bulletin No. 11 (Nov. 14, 1984); Franklin, *Suing Media for Libel: A Litigation Study*, 1981 A.B.A. Res. J. 795, 829; Report, Committee on Communications Law, *Punitive Damages in Libel Actions*, 42 Record of Assoc. of Bar of City of New York 20, 39-40 (Jan./Feb. 1987).

[5] *See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 793-94 (1985) (Brennan, J., dissenting); Note, *Punitive Damages and Libel Law*, 98 Harv. L. Rev. 847 (1985); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269 (1983).

a local television station as part of the largest libel judgment in United States history. The challenged series of broadcasts was critical of the plaintiff's performance as District Attorney, discussing allegations that the plaintiff had improperly settled drunk driving cases.

In *Sprague v. Walter*, No. 3644, N.Y. Times, May 3, 1990, at 1, col. 2 (Pa. Ct. Com. Pl. May 3, 1990), a jury awarded $31.5 million in punitive damages against *The Philadelphia Inquirer* in the second largest libel judgment in U.S. history. This was the second time the case had been sent to a jury. On the first occasion, a different jury imposed a punitive award of "only" $3 million (a difference of $28.5 million) on the same set of facts. *See Sprague v. Walter*, 518 Pa. 425, 543 A.2d 1078, 1082 (affirming trial court order of retrial following first verdict), *appeal dismissed*, 488 U.S. 988 (1988).[6] The challenged articles concerned the plaintiff's role in an in-

[6] Nor is such disparity in results based on the same facts an isolated incident or limited to jury awards. In another recent (nonlibel) case, one judge noted:

> [T]he scoreboard on punitive damages on the *same* case, as to which the *same* principal facts relating to punitive damages were consistently established before finders of fact and reviewing courts, is:
>
> | | |
> |---|---|
> | First Jury (1982) | $ 730,482.10 |
> | First Trial Court (1983) | $ 0.00 |
> | Second Jury (1987) | $11,000,000.00 |
> | Second Trial Court (1987) | $ 8,500,000.00 |
> | Court of Appeal (1992) | $ 2,788,906.00 |
>
> These results make superfluous any further comment on the whimsy, irrationality, and utter unpredictability infecting punitive damages awards in this state. This situation, unless reformed, will obviously continue to exist in California under our punitive damages scheme, which apparently remains constitutionally intact after [*Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991)].

Hilgedick v. Kochring Finance Corp., 5 Cal. App. 4th 1118, 8 Cal. Rptr. 2d 76, 94 (Peterson, J., concurring in the result) (emphasis in original), *review granted*, 832 P.2d 899, 10 Cal. Rptr. 2d 183 (1992).

vestigation of a homicide while he was chief of homicide for the Philadelphia District Attorney's office.

In *Srivastava v. Harte Hanks Communications, Inc.*, No. 85 CI 15150, Communications Daily, May 7, 1990 (Tex. Ct. Com. Pl. May 15, 1990), a jury awarded the plaintiff $17.5 million in punitive damages in a libel action against a local television station. Plaintiff was a heart surgeon whose suit was based on a series of broadcasts reporting the revocation of his privileges at two San Antonio hospitals and detailing his alleged mishandling of several cases.

Despite the Court's admonition in *Gertz* and earlier libel cases, therefore, juries apparently are feeling no particular restraints, constitutional or otherwise, in awarding punitive damages in libel cases. Particularly troubling is the number of these mega-verdicts that are being imposed in cases arising out of commentary on public affairs and the fact that six- and seven-figure punitive awards seem to be imposed on news media defendants almost as a matter of course once the jury finds for the plaintiff on the question of liability.[7] Professor Van Alstyne, commenting on this disturbing pattern, observed that "juries may tend to find whatever they are told is necessary for them to find if they thoroughly dislike the publisher, his publication, his general practice, or his business." Van Alstyne, *First Amendment Limitations on Recovery From the Press*, 25 Wm. & Mary L. Rev. 793, 795-96 (1984).[8]

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[7] *See, e.g., Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1142-43 (7th Cir. 1987) (upholding $2 million punitive damage award based on the amount of attorneys fees, defendant's wealth, and the conclusion that "[p]unitive damages are available under Illinois law when a plaintiff has proven actual malice"), *cert. denied*, 485 U.S. 993 (1988).

[8] Professor Van Alstyne also noted the possibility that attempts to restrict awards under the actual malice rule may have had the opposite impact on jurors:

> [A] juror might suppose that if recklessness must be proved and if recklessness also entitles the defendant to consideration of punitive damages, then absent some exceptional reasons, the juror ought assuredly and quite routinely award punitive damages . . . .

Van Alstyne, 25 Wm. & Mary L. Rev. at 797; *accord* Sack & Tofel, *First Steps Down the Road Not Taken: Emerging Limitations on Libel Damages*, 90 Dick. L. Rev. 609, 613-15 (1989).

The influence of emotion and prejudice in such circumstances, moreover, is not confined to juries: "Discussion of public affairs is often marked by highly charged emotions, and jurymen, not unlike us all, are subject to those emotions." *Gertz*, 418 U.S. at 359 (Douglas, J., dissenting). Excessive damage awards thus also may reflect, in part, "localized judicial distaste for certain publishers" and judges' "understandable, but constitutionally improper, distaste for the defendant's publication." Van Alstyne, 25 Wm. & Mary L. Rev. at 801, 808.

In short, the danger of punitive damages in libel cases is not merely that they lack adequate constitutional restraints; it is that they are, by definition, a court-sanctioned invitation to *punish* the publisher or broadcaster. As long as punitive damages remain available as a weapon in such cases, there will be the temptation to punish for the wrong reasons, and restricting the amount of damages or the procedures under which they are awarded will not remove the temptation. Jurors and judges alike may simply find whatever they are told they need to find to justify the result, if the desire to punish the speaker or publisher is great enough.

II. THE FIRST AMENDMENT REQUIRES THE HIGHEST STANDARDS OF DUE PROCESS WHERE PUNISHMENT OR SUPPRESSION OF SPEECH IS THREATENED.

In *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991), this Court concluded that punitive damage awards are constrained by due process. The Court did not address this issue in the context of First Amendment concerns and did not establish due process standards of

general applicability. Rather, the Court determined only that, in each case, "general concerns of reasonableness and adequate guidance from the court when the case is tried to the jury properly enter into the constitutional calculus." *Id.* at 1043. The Court then "conclude[d] that the punitive damages assessed by the jury against Pacific Mutual were not violative of the Due Process Clause of the Fourteenth Amendment." *Id.* at 1044.

Among the questions left unanswered by the Court's decision in *Pacific Mutual* is the sufficiency of due process standards in the context of libel cases. In one sense, punitive damages awarded in a libel action only differ from similar awards in other cases in that speech is the conduct being punished and deterred. The difference, of course, is significant. The Court has long recognized that any form of state regulation that restricts free speech demands heightened scrutiny of due process concerns, and the award of libel damages is such a "form of state regulation" subject to the rule. *See, e.g., New York Times*, 376 U.S. at 278; *see also R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) (observing that state regulation of even proscribable speech is subject to constitutional restraints).

The general principle was summarized in *Speiser v. Randall*, 357 U.S. 513 (1958):

> When we deal with the complex of strands in the web of freedoms which make up free speech, *the operation and effect of the method* by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied.

Id. at 520 (emphasis added). This principle is reflected in various rules that have been enunciated by the Court to ensure that any form of government restraint does not reach beyond the permitted bounds to impinge on protected speech. For example:

- The burden is on the State to establish that the restraint of speech is justified under the appropriate standard.[9]
- In cases of doubt, the balance must be struck in favor of protecting speech.[10]
- Encompassing both the prior rules, speech is presumed protected until proven otherwise with convincing clarity.[11]
- Those empowered to punish or restrain speech must do so only under narrowly drawn standards to avoid arbitrary and discriminatory content-based action.[12]
- Courts must independently review judgments that threaten protected speech.[13]

Such largely due process concerns, heightened by their First Amendment setting, led four members of the Court in *Dun & Bradstreet* to dissent from the award of punitive damages, even in the context of purely private speech. 472 U.S. at 775-76 (Brennan, J., dissenting). More recently, in *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989), Justice White, joined by Justice O'Connor and the Chief Justice, expressed concern about the constitutionality of punitive damages in a nonlibel (but First Amendment) context:

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[9] *E.g., Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (and cases cited therein).

[10] *E.g., Hepps*, 475 U.S. at 776-78; *Gertz*, 418 U.S. at 341.

[11] *E.g., New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (and cases cited therein).

[12] *E.g., R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992); *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 552-53 (1975) (and cases cited therein).

[13] *E.g., Harte Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510-11 (1984).

> The Court does not address the distinct constitutional questions raised by the award of punitive damages in this case. . . . That award is more troublesome than the compensatory award discussed above.

Id. at 553 n.5 (White, J., dissenting) (citation omitted).

Despite accepting the historic validation of punitive damages, Justice Scalia, in his concurrence in *Pacific Mutual*, also recognized that heightened scrutiny is required of punitive damage awards when First Amendment freedoms are at issue:

> [P]rocedures demanded by the Bill of Rights—which extends against the States only *through* the Due Process Clause—must be provided despite historical practice to the contrary. . . . [P]unitive damages, despite their historical sanction, can violate the First Amendment.

111 S. Ct. at 1054 (Scalia, J., concurring in the judgment) (emphasis in original).

Individual justices and the Court as a whole, therefore, have recognized that the First Amendment requires compliance with heightened due process standards. Neither the standards approved in *Pacific Mutual*, however, nor the standards employed by the West Virginia Supreme Court of Appeals in the current case before the Court, would satisfy these strict due process requirements.

III. THE AWARD OF PUNITIVE DAMAGES IN LIBEL CASES FAILS TO SATISFY HEIGHTENED DUE PROCESS STANDARDS REQUIRED BY THE FIRST AMENDMENT.

The danger punitive damages pose to protected speech was thoroughly explored in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The condemnation of such damages in that case would be enough, standing alone, to declare unconstitutional any punitive award in a libel case involving matters of public concern, were it not for the

Court's qualifying language, "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." *Id.* at 349. The Court thus left open the possibility that punitive damages may be awarded following a liability determination based on *New York Times* "actual malice."

The language in *Gertz* has been interpreted by some lower courts as a ruling that punitive damages flow automatically where *New York Times* "actual malice" is proven.[14] But the Court in *Gertz* did not discuss the relationship, if any, between such a finding and the award of punitive damages. The issue was left open and the holding simply confined to "the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times.*" 418 U.S. at 350. In fact, the constitutional requirement of "actual malice" in libel cases neither includes nor even addresses common law malice or evil motive normally required to support a punitive damage award.[15]

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[14] *See, e.g., Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 273 (7th Cir. 1983) ("if Brown & Williamson does prove actual malice it can recover damages—actual, general, and punitive"). Other courts have been less hasty to assume this conclusion, but have continued to uphold punitive awards, in some cases because of the courts' uncertainty. *See, e.g., Maheu v. Hughes Tool Co.*, 569 F.2d 459, 479 (9th Cir. 1977) ("To us, the implication of the [*Gertz*] Court's use of the double negative is that punitive damages may be permitted when actual malice is proven.") (and cases cited therein).

[15] Courts as well as juries often use the term "actual malice" to connote much more than the limited defamation standard of liability applicable to public figures and issues:

> We recognize that the term "actual malice" has meant different things in the law, that its popular connotation may not always be the same as its legal meaning, and that its use has been criticized. Nevertheless, we simply use the term in this opinion as a shorthand method of referring to conduct characterized by evil motive, intent to injure, ill will, or fraud. *In instruct-*

For First Amendment purposes, punitive damages in libel cases must be viewed separately from the issue of liability, as a form of government action that seeks to punish and to deter speech.[16] Punitive damages thus must be subjected to the same careful scrutiny and heightened due process considerations that would be required of any statutory scheme that attempted to accomplish the same ends. *See New York Times*, 376 U.S. at 277 ("What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel."). Viewed in this perspective, punitive damages as currently awarded in libel cases, at least

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ing juries with respect to punitive damages, however, it would be preferable for trial judges not to use the term "actual malice."

Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 601 A.2d 633, 652 n.20 (1992) (citations omitted and emphasis added).

Even when the actual malice rule is properly applied, it does not necessarily reach the issue of whether the defendant's conduct is truly "outrageous" and prompted by the "evil motives" normally required to be shown before punitive damages may be awarded. *See* RESTATEMENT (SECOND) OF TORTS § 908(2) (1977) (imposition of punitive damages is premised on outrageous conduct arising out of the defendant's evil motives). The requirement of actual malice in libel cases is a tool for defining the standard of liability, not the level of damages. "Actual malice" focuses only on the defendant's attitude toward the facts, and not on the defendant's attitude toward the plaintiff or any intent to do harm. *See, e.g., Harte Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989); Note, *Punitive Damages and Libel Law*, 98 Harv. L. Rev. 847, 854 (1985). It is possible, therefore, to have a technical finding of "actual malice" as defined by *New York Times* where there is absolutely no evidence of "malicious" conduct in the common sense of the word. The jury may then be invited to award punitive damages without any further restrictions.

[16] The legitimate state interest underlying the law of libel "extends no further than compensation for actual injury," *Gertz*, 418 U.S. at 349, and "punitive damages are wholly irrelevant to th[at] state interest." Id. at 350. The justification for punitive damages in libel cases thus must be assessed on its own merits; it does not flow automatically from the rationale for compensatory damages.

those cases involving matters of public concern, fail to comply with the heightened due process mandated by the First Amendment.

The Alabama jury instruction upheld in *Pacific Mutual* "enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory." 111 S. Ct. at 1044. The instruction also specifically provided that the jury "must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong." *Id.*

In an action for libel, however, such instructions immediately conflict with First Amendment values. The declared purpose of "preventing similar wrong" in the context of defamation translates into a purpose to deter future speech. This is fundamentally at odds with the purposes of the First Amendment to encourage free and open debate and to prevent self-censorship. *See Gertz*, 418 U.S. at 350; *see also Near v. Minnesota*, 283 U.S. 697, 713-20 (1931) (discussing purposes of the First Amendment in the context of statutory restraint of speech).

In the case before this Court, the West Virginia Supreme Court of Appeals expanded on the Alabama instruction, requiring that the jury be instructed with many of the same factors Alabama courts may consider on appeal, *i.e.*, the "reprehensibility" of the defendant's conduct, including "whether how often the defendant engaged in similar conduct in the past"; that punitive damages should bear a "reasonable relationship" to compensatory damages awarded and to "the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred"; and that "the financial position of the defendant is relevant." *TXO Prod. Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870, 886-87 (W. Va. 1992). At best such instructions provide no due process

assurances in a libel case; at worst, they virtually guarantee that defendants' First and Fourteenth Amendment rights will be infringed.

These instructions permit the jury to assess punitive damages based, at least in part, on "similar conduct in the past" including conduct that did not result in compensable injury to the plaintiff, and may not have been actionable at all. *See id.* at 884 (permitting jury to consider evidence against TXO from case in which TXO prevailed). Such "conduct" in the libel context is constitutionally protected speech. Assessing punishment for current liability based on the prior exercise of a constitutional right is a classic violation of due process. *E.g.*, *North Carolina v. Pearce*, 395 U.S. 711, 723-24 (1969); *see Near*, 283 U.S. at 713-20 (striking down state statute permitting injunction of newspaper operations as a nuisance based on past speech).

At a minimum, a media defendant could be compelled in every libel suit to relitigate numerous prior libel claims, whether or not such claims resulted in a lawsuit or a finding of liabilty. Media defendants thus would face virtually limitless liability based on prior, presumptively protected speech, as well as on previous findings of liability for which past plaintiffs already have been compensated. Imposing punitive liability for protected speech is anathema to the First Amendment, and assessing punitive damages based on a prior finding of unprotected speech—without limitation or substantive standards—does not meet minimal requirements of due process, much less the heightened standards required when First Amendment freedoms are implicated.

Nor is a viable limitation imposed on the jury's discretion when it is instructed that punitive damages should be "reasonably related" to "the harm that is *likely* to occur from the defendant's conduct as well as to the harm that actually has occurred." *Id.* at 886 (emphasis added). Such an instruction invites the jury to speculate on what

damage might have resulted under unspecified circumstances, unfettered by the constraints of foreseeability, proximate cause, or any other legal doctrine. Juries need little enough prompting to punish unpopular speech or defendants without instructing them to postulate on the possible harm that could have resulted "for want of a nail."

Requiring a "reasonable relationship" to compensatory damages also is an illusory restraint, particularly in libel cases in which compensatory damages are not subject to precise proof, and in some cases—despite the requirement in *Gertz* of actual injury, 418 U.S. at 349-50—"compensatory" damages are presumed and thus assessed without any proof.[17] The term "reasonable relationship," moreover, is not defined and has no inherent meaning. It accordingly fails to provide any effective limitation on a jury's discretion, as illustrated by the jury's apparent belief in *TXO* that $10 million in punitive damages bears a "reasonable relationship" to $19,000 in compensatory damages.

The West Virginia scheme for awarding punitive damages is more detailed than the Alabama instruction upheld in *Pacific Mutual*, but it nevertheless

> invites—even requires—arbitrary results. It gives free reign to the biases and prejudices of individual jurors, allowing them to target unpopular defendants and punish selectively. In short, it is the antithesis of due process.

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[17] *See Gertz*, 418 U.S. at 349 ("Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms.").

Pacific Mutual, 111 S. Ct. at 1067 (O'Connor, J., dissenting).

Even if theoretical jury instructions could be devised to remedy these problems, however, the process of awarding punitive damages for libel remains one of punishment based on the content of speech. The award of punitive damages for libel also fails to provide the "breathing space" required in discussion of public affairs. Under even the most careful standards, it is virtually impossible to ensure that the future speech intended to be deterred will be limited to speech that is unprotected by the First Amendment. Such a loose standard in a statutory scheme would clearly be unconstitutional. *See Freedman v. Maryland*, 380 U.S. 51 (1965) (invalidating motion picture censorship statute on heightened due process grounds).

In short, the due process standards upheld in *Pacific Mutual* and as applied by the West Virginia Supreme Court of Appeals do not afford proper due process constraints on jury discretion, much less provide sufficient safeguards to protect First Amendment freedoms. Although standards and procedures that would ensure punishment of only unprotected speech may theoretically exist, both the concept and the practice of awarding punitive damages in the context of public debate appear to be fundamentally at odds with the purposes of the First Amendment.

IV. DEFERENTIAL APPELLATE REVIEW OF PUNITIVE DAMAGE AWARDS CANNOT SATISFY CONSTITUTIONAL REQUIREMENTS.

Despite the long-standing requirement of independent appellate review to protect against judgments that threaten First Amendment rights, *e.g.*, *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 498-511 (1984), all too often appellate courts have refused to disturb judgments of punitive damages in libel cases unless "monstrously excessive" or so large

as to "shock the judicial conscience."[18] The Court in *Pacific Mutual* upheld Alabama's more detailed post-verdict review factors, but the scrutiny employed by subsequent courts for the most part has remained highly deferential, even in the First Amendment context.[19]

West Virginia adopted virtually the same factors for consideration on review upheld in *Pacific Mutual*. Along with cost and mitigation factors, the reviewing court must consider the reprehensibility of the defendant's con-

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[18] *See Gertz*, 418 U.S. at 350 ("In most jurisdictions, jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive."); *Brown & Williamson*, 827 F.2d at 1141 ($2 million punitive damage award upheld because the court concluded that jury was not "mere putty in the hands of the plaintiff").

[19] Courts generally have continued to use existing standards of review as being consistent with this Court's decision in *Pacific Mutual*. *See, e.g., Peoples Bank and Trust Co. v. Globe Int'l Publishing Co.*, 978 F.2d 1065, 1071 (8th Cir. 1992) (remanding for "substantial remittitur" of "shockingly inflated" $650,000 compensatory damage award, but affirming punitive damage award of $850,000, stating only that "[i]n formulating its instructions, the district court adequately considered the criteria set forth in [*Pacific Mutual*], as well as the appropriate Arkansas law"); *Brown v. Petrolite Corp.*, 965 F.2d 38, 49 (5th Cir. 1992) (concluding without analysis that punitive damage award of $700,000 was reasonably related to actual damages of $60,000 because "[a] rational jury could have found that the nature of the defamation, [defendant's] culpability, and the public's sense of justice required [defendant] to pay substantial exemplary damages" and defendant "failed to demonstrate that the exemplary damage award is a result of the jury's passion rather than its reason"); *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1382 (5th Cir. 1991) (upholding award of $1,000 compensatory and $500,000 punitive damages, concluding that "[i]f there are *any* circumstances of probative force that support the amount of the [punitive damage] award, then the award meets the 'reasonableness' prong of the due process test in *Haslip*.") (emphasis in original); *Principal Financial Group v. Thomas*, 585 So. 2d 816, 818 (Ala.) (upholding compensatory damage award of $1,000 and punitive damage award of $750,000, finding a reasonable relationship based in part on the "greviousness" of a harm that is "too small to obtain lawyers who can afford to file suit"), *cert. denied*, 112 S. Ct. 649 (1991).

duct, the defendant's financial situation, and whether the award of punitive damages bears a "reasonable relationship" to the compensatory damages and to the actual and likely resulting harm. *TXO*, 419 S.E.2d at 887. As illustrated by the West Virginia Supreme Court of Appeals' decision, however, these standards fail to impose a sufficiently definite and meaningful constraint on the discretion of juries in awarding punitive damages, particularly in a libel context.

The *TXO* court analyzed the Alabama West Virginia standards by focusing primarily on what constituted a "reasonable relationship" between punitive and compensatory damages. The court concluded that a relationship of roughly five to one is reasonable for "really stupid" defendants,[20] when compensatory damages are neither negligible (in which case a much greater proportion would be permissible) nor very large (when a smaller proportion might be in order). For "really mean" defendants,[21] on the other hand, the court determined that virtually no proportion is required. Rather, the award of punitive damages against such a defendant is evaluated under a reformulation of the remaining factors, specifically:

> (1) the potential harm that [the defendant's] actions could have caused; (2) the maliciousness of [the defendant's] actions; and (3) the penalty necessary to discourage [the defendant] from undertaking such endeavors in the future.

Id. at 889.

Particularly in the First Amendment context, these standards afford far too little protection against abuse. Protected speech often may be "harmful" to some persons and beneficial to others. The media unavoidably publish

[20] "By really stupid defendants, we signify those defendants who have not harmed victims intentionally, but have harmed them as a result of extreme carelessness—in most cases caused by a foul-up in the middle of some corporate bureaucracy that has pushed some victim into a red-tape limbo." *Id.* at 888.

[21] "By really mean defendants, we signify those defendants who intentionally commit acts they know to be harmful." *Id.* at 889.

" 'vehement, caustic, and sometimes unpleasantly sharp attacks' which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971) (quoting *New York Times*, 376 U.S. at 270) (citation omitted). Such speech cannot be protected if media defendants risk being labeled as "really mean" simply because they exercise their constitutional rights in furtherance of their role in our democratic society.

Even if media defendants somehow could be meaningfully categorized as "really stupid" or "really mean," such standards would not protect First Amendment values. Under the West Virginia court's test, a punitive damage award assessed against a "really stupid" defendant need bear "roughly" a five to one proportion to the compensatory damages (including general or presumed damages) unless those compensatory damages are negligible—in which case virtually no proportion is required. Only if the compensatory and punitive damages are both very large might the court impose a smaller proportion.

Such variable proportionality to compensatory damages imposes no practical limit on punitive damages, particularly when compensatory damages for libel are largely subjective and often arbitrary. *See Gertz*, 418 U.S. at 349. In practical effect, a large punitive damage award would be upheld against a "really stupid" media defendant unless that award is significantly larger than an enormous compensatory damage award. This "proportionality" scheme thus gives an appearance of fairness while virtually guaranteeing that all but the most monstrously excessive punitive damage awards will be upheld on review.

The standard for reviewing punitive damages awarded against "really mean" media defendants would include even fewer safeguards. Rather than relying on a possibly discernible "reasonable relationship," the reviewing court assesses only (1) the potential harm that could result from the defendant's speech, (2) its maliciousness, and (3) the penalty necessary to discourage future speech.

Assessing the reasonableness of punitive damages based on the *potential harm* to *anyone* that *could* have resulted from the defendant's speech, however, limits such awards only to the reviewing court's imagination and ability to speculate on the existence and amount of possible damages to unknown persons. *See TXO*, 419 S.E.2d at 889 (finding that TXO's conduct "could potentially cause millions of dollars in damages to other victims"). "Maliciousness," the second factor, apparently means little more than relying on the size of the jury's award to determine the degree of reprehensibility, *see id.* ("the jury's verdict says more than we could say in an opinion twice this length"), and the third factor, the penalty necessary to discourage future conduct, will depend on the financial resources of the defendant. *See id.* at 889-90 (evaluating the estimated net worth of TXO's parent corporation and concluding that "an award of this magnitude is necessary to discourage TXO from continuing its pattern and practices of fraud, trickery and deceit"). "[N]o test relating to 'fairness' in the abstract . . . would approve this procedure, unless it is whether something even more unfair could be imagined." *Pacific Mutual*, 111 S. Ct. at 1053 (Scalia, J., concurring in the judgment).

Such elusive standards of review, moreover, are inconsistent with appellate courts' "duty to 'independently decide whether the evidence in the record is sufficient to cross the constitutional threshold' " marked by the First Amendment. *Harte Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989) (quoting *Bose*, 466 U.S. at 511). The Court in *Bose* explained that a jury's application of First Amendment principles

> "is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks' which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail."

466 U.S. at 510 (quoting *Monitor Patriot*, 401 U.S. at 277 (quoting *New York Times*, 376 U.S. at 270)) (citation omitted). The threat of unrestrained damages

equally jeopardizes First Amendment interests, *Dun & Bradstreet*, 472 U.S. at 770 (White, J., concurring), and the appellate court's duty under *Bose* to protect against the entry of judgments that encroach upon protected speech logically extends to judgments of punitive damages as well. *See Bose*, 466 U.S. at 511.

Judges, like juries, also can find neutrality difficult in the context of unpopular or personally offensive speech. *See, e.g., Peoples Bank and Trust Co. v. Globe Int'l, Inc.*, 786 F. Supp. 791, 795 (W.D. Ark. 1992) (characterizing the defendant's publication as "what reasonable jurors might find is muck, mire and slime spewed forth by defendant"), *aff'd in part and remanded in part on other grounds*, 978 F.2d 1065 (8th Cir. 1992). Yet, the court of appeals in *Peoples Bank and Trust*, under a "manifest abuse of discretion" standard, remanded the "shockingly inflated" *compensatory* damage award of $650,000 for "substantial remittitur" but simultaneously upheld the *punitive* damage award of $850,000 without independent analysis. The court simply deferred to the jury determination because "[i]n formulating its instructions, the district court adequately considered the criteria set forth in [*Pacific Mutual*], as well as appropriate Arkansas law." *Peoples Bank and Trust Co. v. Globe Int'l Publishing Co.*, 978 F.2d 1065, 1071 (8th Cir. 1992); *See Brown v. Petrolite Corp.*, 965 F.2d 38, 49 (5th Cir. 1992) (upholding punitive damage award of $700,000 as reasonably related to actual damages of $60,000 and concluding that defendant "failed to demonstrate that the exemplary damage award is a result of the jury's passion rather than its reason"). First Amendment values cannot be, and are not being, protected under the deferential review accorded punitive damages by courts interpreting the general due process standards approved in *Pacific Mutual*.

Whether the conduct at issue in a libel suit could possibly justify the imposition of enormous civil fines meant to deter speech in the future is a determination that cannot be reviewed solely for whether a jury acted out of "passion and prejudice," or whether the amount is "excessive," or even whether it bears some "rational relationship" to harm

caused in the past. The First Amendment requires far more precise limits. "Uncertainty as to the scope of the constitutional protection can only dissuade protected speech—the more elusive the standard, the less protection it affords." *Connaughton*, 491 U.S. at 686. The precise limits on punitive damages mandated by the First Amendment remain to be explored in an appropriate future case, and the Court should expressly reserve defining those limits for such a case. Deferential appellate review, however, does not guarantee compliance with general due process concerns—much less the heightened due process standards required in a First Amendment context—so long as juries retain discretion to punish and to deter speech through awards of punitive damages.

CONCLUSION

Punitive damages as currently awarded in libel cases are fundamentally inconsistent with First Amendment values. Even if standards for imposing such damages without infringing protected speech might be devised in a future case, the standards applied by the West Virginia Supreme Court of Appeals provide little due process protection in the ordinary case, and clearly would not satisfy the heightened due process that would be required in a First Amendment case. Under the West Virginia standards, juries in libel cases involving public controversies would remain free to punish unpopular views with no meaningful restraints. Punitive damage awards imposed under such conditions are a remedy that society cannot afford and that the Constitution does not permit.

Respectfully submitted,

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APPENDIX

APPENDIX

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The Association of American Publishers, Inc. is the major national association in the United States of publishers of general books, text books and educational materials. Its more than 200 members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers including university presses and scholarly associations.

Magazine Publishers of America, Inc. is a national trade association including in its present membership 196 domestic magazine publishers who publish over 800 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering literature, religion, law, political affairs, science, agriculture, industry and many other interests, avocations and pastimes of the American people.

The National Association of Broadcasters ("NAB"), organized in 1922, is a non-profit incorporated trade association that serves and represents radio and television stations and networks. NAB's members cover, produce and broadcast the news to the American people. NAB seeks to preserve and enhance its members' ability to freely disseminate information concerning the activities of government and other matters of public interest and concern.

The Newsletter Publishers Association, Inc. ("NPA") represents 650 publishers of newsletters and specialized information services. The NPA has long worked to preserve the First Amendment rights of newsletter and other publishers.

The Newspaper Association of America ("NAA") represents approximately 1,525 daily newspapers representing more than 90 percent of the newspaper circulation in the United States. NAA membership also includes a substantial number of non-daily U.S. newspapers.

Radio-Television News Directors Association is the principal professional association of electronic journalists

in the United States. The Association's members gather, edit and disseminate news and other public affairs information carried by the national broadcast and cable networks, local radio and television broadcast stations, and cable television systems.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of working reporters and editors dedicated to defending the First Amendment and freedom-of-information interests of the news media and public. The Reporters Committee has provided representation, legal guidance and research in virtually every major press freedoms case litigated since 1970.

The Society of Professional Journalists is a voluntary, non-profit organization of 14,000 members. The Society is the largest and oldest organization of journalists in the United States, representing every branch and rank of print and broadcast journalism.